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Supreme Court of the United States

OCTOBER TERM, 1954

NO. 55

INDIANA DEPARTMENT OF STATE REVENUE, GROSS INCOME TAX DIVISION, STATE OF INDIANA,

Petitioner,

v.

MARK E. NEBEKER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

Petitioner's brief adequately refers to the opinions below (116 N. E. 2d 104), the grounds on which the jurisdiction of this Court is invoked and the constitutional provisions involved. Inadequacies in petitioner's statement of the statutes and regulations involved, petitioner's statement of the questions presented for review and petitioner's statement of the case are hereinafter supplied.

SUPPLEMENTAL STATEMENT OF STATUTES AND REGULATIONS INVOLVED

In addition to the Commerce Clause of the Federal Constitution, petitioner's Regulations 2805 and 1005, set forth at pages 4 and 5 of petitioner's brief, and Sections 1(n), 3(f), 3(h), 3(i) and 5(b) of the Indiana Gross Income Tax Act, set forth in Appendix "A" at pages 27-29 of petitioner's brief, the following provisions of the Indiana Gross Income Tax Act and petitioner's Regulations are involved in the determination of the questions presented in this case, viz.:

The final two provisos of Section 1(m) of the Indiana Gross Income Tax Act of 1933, as amended, reading:

> "* * * Provided, further, That with respect to individuals resident in Indiana and corporations incorporated under the laws of Indiana authorized to do and doing business in any other state and/or foreign country, the term 'gross income' shall not include gross receipts received from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana, or from activities incident thereto (including the disposal of capital assets or other properties which had been theretofore acquired or used in carrying on such trade or business): Provided, further, That it is not the intention by the foregoing language to exclude from the definition of 'gross income' any receipts of a taxpayer received as interest or dividends, or from sales, or other receipts received from investments, which investments were acquired and/or disposed of other than in connection with the business in which such taxpayer is regularly engaged, nor shall this exclusion be construed as applying to salaries, wages, bonuses, commissions, or other personal re-

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muneration of any kind or character received by any taxpayer." (Indiana Acts of 1933, Ch. 50, Sec. 1, as amended by Ch. 117 of the Indiana Acts of 1937, Sec. 1, as finally amended by Chapter 370 of the Indiana Acts of 1947, Sec. 1, Burns' Ind. Stats., Sec. 64-2601(m).)

Petitioner's Regulation 4100, Rule 4, reading:

"Rule 4. Receipts from Businesses Maintained and Operated Wholly Outside the State. Persons resident and/or domiciled in Indiana who are engaged in business, the legal situs and location of which is in a state other than Indiana, and the activities of such business are carried on in states other than Indiana, will not be required to pay tax upon the gross receipts therefrom. For the purpose of this ruling the operation of a farm will be included under the term 'engaged in business.'" (Indiana Gross Income Tax Regulations 46, Series VII, Reg. 4100, Rule 4; Commerce Clearing House Indiana Tax Service P 10-103.)

Indiana statutes authorize the courts to take judicial notice of the official regulations promulgated by petitioner. Indiana Acts of 1945, Ch. 120, Sec. 11, Burns' Ind. Stats., Section 60-1511.

THE QUESTIONS PRESENTED

I

Do sales on the New York Stock Exchange of securities owned by an Indiana resident and held in margin stock brokerage accounts maintained by such Indiana resident with broker members of the New York Stock Exchange constitute sales in interstate commerce?

II

If the foregoing Question I is answered in the affirmative, does the Commerce Clause of the Federal Constitution prohibit the imposition of the Indiana gross receipts tax on the gross gains from such interstate sales of securities sold at a gross profit?

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's statement of the case summarizes the three brief stipulations containing the entire evidence on which the case was submitted to the trial court (stipulation in the administrative proceeding before petitioner, R., pp. 5-12; stipulations entered into in trial court, R., pp. 21-23). The gist of the stipulations is that respondent was engaged during the years 1944-1946 in carrying margin stock brokerage accounts with broker members of the New York Stock Exchange, from which accounts respondent made numerous sales of stocks at a gross profit (32 such sales in 1944, 31 such sales in 1945, and 13 such sales in 1946). The stipulations show principally that the certificates evidencing the stocks sold were held by the brokers in New York City and that records of the sales were kept in both the New York and Indiana offices of such brokers.

The stipulations fairly assumed that the manner in which margin stock brokerage accounts are handled is a matter of general knowledge well known to the courts and, accordingly, did not particularize the dealings and activities necessarily involved in the operation of such accounts. Brief reference to the relationship of the parties and their dealings and activities across state lines in carrying on such margin brokerage accounts is requisite to the proper presentation of respondent's argument.

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Respondent, the customer and the owner of the stocks, is an Indiana resident. The brokers have their principal offices in New York City, with branch offices in Indianapolis and Terre Haute. Whether acting in New York City or in Indianapolis or Terre Haute, the brokers are agents of respondent and as such agents carry out respondent's orders in the purchase and sale of stocks. When each margin account was initially established respondent delivered cash or stocks or both, through his broker agent in Indianapolis or Terre Haute, to his broker agent in New York City. Any additions made by respondent of money or stocks to such accounts would be transmitted in interstate commerce to New York City. Respondent therefore established each account by the transmission of money or stocks or both in interstate commerce. Thereafter each purchase and sale of stocks was made pursuant to respondent's orders. Each order to purchase and each order to sell was given by respondent in Indiana and transmitted in interstate commerce to the brokers' offices in New York City; and all memoranda of purchases and sales, all invoices and all other communications of intelligence in the handling of accounts were transmitted in interstate commerce between Indianapolis or Terre Haute and New York. When either account should be finally closed out the New York broker will remit the residue of money or stocks in the account in interstate commerce to respondent in Indiana.

All purchases and sales of stocks in such margin accounts are made on the New York Stock Exchange, the principal national securities market in the United States, engaged predominantly in the interstate sale and marketing of securities among investors and dealers residing in all of the states and throughout the world. The transac-

tions on such Exchange, and the entire operation of the Exchange, are deemed to be in the stream of interstate commerce and are subjected to regulation under the Securities Exchange Act pursuant to the power of Congress to regulate interstate commerce (Securities Exchange Act of 1934, 15 U.S.C. 78a-78jj).

SUMMARY OF ARGUMENT

Respondent is engaged in the interstate business of the operation of margin stock brokerage accounts on the New York Stock Exchange through the employment of brokers in New York City who have the custody of the certificates evidencing the stocks held in the accounts. Except for the local holding and delivery of the stock certificates in New York, the entire operation of the brokerage accounts, carried on by the continuous interchange of intelligence across state lines and the selling of stocks in a national exchange, constitutes interstate commerce. The local handling of the stock certificates in New York City does not convert such interstate business into local transactions.

United States v. South-Eastern Underwriters Assn. (1944), 322 U. S. 533;

Swift & Company v. United States (1905), 196 U. S. 375;

Stafford v. Wallace (1922), 258 U. S. 546;

International Text Book Co. v. Pigg (1910), 217 U. S. 91;

Freeman v. Hewit (1946), 329 U. S. 249;

Gross Income Tax Division v. Quick (1938), 226 Ind. 329, 78 N. E. 2d 871, cert. den. 335 U. S. 860;

Gross Income Tax Division v. Strauss (1938), 226 U. S. 338, 79 N. E. 2d 103, cert. den. 335 U. S. 860.

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The Indiana gross income tax, as imposed by petitioner's Regulation 2805 on the gross profits from sales of stocks held in margin accounts, is a gross earnings or gross profits tax, not a net income tax. Allowance of deduction for selling expenses and losses in other sales is essential to any determination of net income. The Indiana tax is imposed, on an individual transaction basis, on the gross profit represented by the difference between gross sales price and cost of the stock sold, without allowance for selling expenses or for losses in other transactions. It is a gross profits tax, not a net income tax.

Peck & Co. v. Lowe (1918), 247 U. S. 165;
United States Glue Co. v. Oak Creek (1918), 247 U. S. 321;
Shaffer v. Carter (1920), 252 U. S. 37;
Atlantic Coast Line v. Daughton (1923), 262 U. S. 413;
Gwin, White & Prince, Inc. v. Henneford (1939), 305 U. S. 434.

The imposition by Indiana of an unapportioned gross profits tax on the total gross profits derived from interstate sales of stocks from margin brokerage accounts is a direct burden on commerce, because it is imposed on gross profits, not net income, because it imposes a potential multiple tax burden on commerce and because it discriminates against commerce.

Phila. Steamship Co. v. Pennsylvania (1887), 122 U. S. 326;
Crew Levick Co. v. Commonwealth (1917), 245 U. S. 292;
Fisher's Blend Station, Inc. v. Tax Commission (1936), 297 U. S. 650;

Puget Sound Stevedoring Co. v. State Tax Commission (1937), 302 U. S. 90;
J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307;
Gwin, White & Prince, Inc. v. Henneford (1939), 305 U. S. 434;
McLeod v. J. E. Dilworth Company (1944), 322 U. S. 327;
Freeman v. Hewit (1946), 329 U. S. 249.

The Indiana tax is a direct burden on commerce, because it is a tax on gross profits. It imposes a potential multiple burden on commerce, because both New York State and New York City may impose the same tax imposed by Indiana. It is a discriminatory burden on commerce because (a) it is unapportioned and taxes the full gross profits from interstate business; (b) it imposes a potential multiple tax burden on commerce; (c) it specifically discriminates against the interstate business of operating margin brokerage accounts by the provisions of Section 3(h) of the Act, taxing gross earnings from sales transactions of public terminal grain handlers on an annual basis, allowing all losses to be deducted from gains; and (d) it further specifically discriminates against the interstate business of operating margin brokerage accounts by the provisions of Section 1(m) and Regulation 4100, Rule 4, totally exempting the receipts of all other taxpayers derived from the operation of a business carried on at an out-of-state business situs, but taxing the gross profits of a margin brokerage account established at a business situs outside Indiana.

To sustain the instant tax would potentially open the door to the imposition of new state gross receipts, gross earnings and gross profits taxes on the vast interstate com-

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merce of the country in margin and hedging transactions on the stock, grain and commodity exchanges, in addition to the wide-spread state net income taxes already imposed on such commerce. The Indiana tax is necessarily a gross tax, is an invalid burden on commerce and should be condemned as such. If Indiana wishes to impose a tax on income from interstate commerce, it should adopt a true net income tax.

ARGUMENT

I

SALES ON THE NEW YORK STOCK EXCHANGE OF STOCKS OWNED BY AN INDIANA RESIDENT FROM MARGIN STOCK BROKERAGE ACCOUNTS MAINTAINED WITH BROKER MEMBERS OF THE NEW YORK STOCK EXCHANGE CONSTITUTE SALES IN INTERSTATE COMMERCE

Respondent's Activities Are Predominately In Interstate Commerce

The stock brokerage accounts from which the receipts sought to be taxed arose were created by the transmission by respondent in Indiana to New York City brokers of money or securities in interstate commerce. The sales transactions were sales made by respondent, an Indiana resident, through his New York City agent brokers to other agent brokers in New York City or through them to purchasers located anywhere in the world. All of the intelligence which directed the management of respondent's margin accounts, including the sale of stocks, was transmitted in interstate commerce between Indiana and New York. Except for the retention in New York City of the stock certificates (the evidentiary papers of respondent's ownership of stock in many corporations incorporated and carrying on business in many states), the business, management, control and operation of respondent's margin accounts and the sale of stocks on such interstate stock exchange were carried on in interstate commerce. Any doubt as respects the interstate character of the business of such margin account operations was dispelled by the Court's decision in *United States v. South-Eastern*

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Underwriters Assn. (1944), 322 U. S. 533, holding that the business of insurance carried on across state lines constitutes interstate commerce and overruling the Court's earlier decision to the contrary in *Paul v. Virginia* (1869), 8 Wall 168.

Indistinguishable Insurance Business Is Interstate Commerce

The *South-Eastern Underwriters* decision destroyed the notion that by isolating a part of a vast interstate operation, such as looking at the making of a local contract of insurance, or, as in this case, the retention of the stock certificates in the brokers' hands in New York City, such interstate business could be characterized as intrastate. Speaking for the Court, Mr. Justice Black said:

> "One reason advanced for the rule in the Paul case has been that insurance policies 'are not commodities to be shipped or forwarded from one State to another.'* But both before and since Paul v. Virginia this Court has held that Congress can regulate traffic though it consist of intangibles.* Another reason much stressed has been that insurance policies are mere personal contracts subject to the laws of the state where executed. But this reason rests upon a distinction between what has been called 'local' and what 'interstate,' a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. Cf. Wickard v. Filburn, 317 U. S. 111, 119, 120, 63 S. Ct. 82, 86, 87, 87 L. Ed. 122; Parker v. Brown, 317 U. S. 341, 360, 63 S. Ct. 307, 318, 87 L. Ed. 315. We may grant that a contract of in-

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* Footnotes omitted.

surance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce. Cf. Hall v. Geiger-Jones Co., 242 U. S. 539, 557, 558, 37 S. Ct. 217, 223, 224, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643. But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce.* Only by treating the Congressional power over commerce among the states as a 'technical legal conception' rather than as a 'practical one, drawn from the course of business' could such a conclusion be reached. Swift & Co. v. United States, 196 U. S. 375, 398, 25 S. Ct. 276, 280, 49 L. Ed. 518. In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce.*'" (322 U. S. 546-47)

and

"The real answer to the question before us is to be found in the Commerce Clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. Lottery Case (Champion v. Ames), 188 U. S. 321, 355, 23 S. Ct. 321, 326, 47 L. Ed. 492. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier, Hoke v. United States, 227 U. S. 308, 320-323, 33 S. Ct. 281, 283, 284, 57 L. Ed. 523, 43 L. R. A., N. S., 906, Ann. Cas. 1913E, 905; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, United

* Footnotes omitted.

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States v. Simpson, 252 U. S. 465, 40 S. Ct. 364, 64 L. Ed. 665, 10 A. L. R. 510; to drive a stolen automobile from Iowa to South Dakota, Brooks v. United States, 267 U. S. 432, 436-439, 45 S. Ct. 345, 346, 347, 69 L. Ed. 699, 37 A. L. R. 1407. Diseased cattle ranging between Georgia and Florida are in commerce, Thornton v. United States, 271 U. S. 414, 425, 46 S. Ct. 585, 588, 70 L. Ed. 1013; and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount federal regulation, Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 11, 24 L. Ed. 708. Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation; — activities which, as part of the conduct of a legitimate and useful commercial enterprise, may embrace integrated operations in many states and involve the transmission of great quantities of money, documents, and communications across dozens of state lines." (322 U. S. 549-50)

No difference of substance exists between respondent's business involving the sales of stocks from margin brokerage accounts on the New York Stock Exchange and the business of insurance conducted across state lines. Without any actual interstate delivery in either instance of the insurance policies or the stocks sold, both activities are

submerged in the overwhelming chain of events which constitutes interstate commerce

Congress Regulates Transactions On National Securities Markets Under the Commerce Power

Regulation of margin requirements provided for by Section 7 of the Securities Exchange Act of 1934 is founded principally on the power of Congress to regulate interstate commerce, as set forth in the preamble of Congressional findings, contained in Section 2 of the Act, that the regulation of securities transactions on exchanges is necessary in order to protect interstate commerce because such transactions are effected by means of the mails and instrumentalities in interstate commerce, constitute an important part of the current of interstate commerce, directly affect the financing of trade, industry and transportation in interstate commerce and directly affect and influence the volume of interstate commerce. Securities Exchange Act of 1934; 15 U. S. C. 78b.

Congress Regulates Transactions On National Livestock Markets Under the Commerce Power

Similarly, the operations at the national stockyards, to which livestock is sent for sale, without prior interstate negotiation of sale, and with local delivery at the stockyards of the livestock sold after a purchaser therefor has been found, have been subjected to regulation by Congress under the Commerce Clause, Packers and Stockyards Act of 1921, 7 U. S. C. 181-229; *Stafford v. Wallace* (1922), 258 U. S. 546, and have been held subject to the anti-trust laws

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enacted by Congress under its power to regulate commerce. *Swift & Company v. United States* (1905), 196 U. S. 375.

The Conduct of a Correspondence School Course Across State Lines Is Interstate Commerce

The conduct of a correspondence school course across state lines, involving continuous intercourse between the school in Pennsylvania and its scholars and agents in other states, by means of correspondence through the mails, and transportation of books, apparatus and papers used in the course of study, was held to constitute interstate commerce, immune from state regulation, in *International Text-Book Co. v. Pigg* (1910), 217 U. S. 91, and the correspondence school, a foreign corporation, was held entitled to sue in the Kansas courts, notwithstanding its failure to comply with the foreign corporation qualification requirements of the Kansas statutes, on a contract locally negotiated by the school's Kansas solicitor with a Kansas resident enrolling the Kansas resident in a course of instruction and providing a fee therefor.

Sales of Produce Shipped to Out-State Markets to Find a Buyer Are Interstate Sales

Sales of poultry and livestock shipped to established out-of-state markets by an Indiana seller for sale there after a buyer should be procured, and without prior sales negotiation, were held by the Indiana Supreme Court to constitute sales in interstate commerce and entitled to Commerce Clause immunity from the imposition of the Indiana gross receipts tax. *Gross Income Tax Division v. Quick* (1938), 226 Ind. 329, 78 N. E. 2d 871; *Gross Income Tax Division v. Strauss* (1938), 226 Ind. 338, 79 N. E. 2d 103.

This Court denied a petition for a writ of certiorari in those cases. 335 U. S. 860.

Stock Sales On the New York Stock Exchange Are in the Stream of Commerce and a Part of Commerce

Under the stream of commerce theory applied to national markets, as exemplified in such cases as *Swift & Company v. United States; Stafford v. Wallace; Gross Income Tax Division v. Quick* and *Gross Income Tax Division v. Strauss, supra,* the stocks in respondent's margin accounts maintained with the New York brokers were put into the stream of interstate commerce when such stocks were offered for sale on the New York Stock Exchange and the ensuing sales of such stock constituted sales in interstate commerce.

The Unsound Intrastate Theory of the Cotton Broker Cases Is Obsolete and Inapplicable

The decision in *Ware & Leland v. Mobile County* (1908), 209 U. S. 365, relied on by petitioner (Brief, p. 22), upheld, on the authority of *Paul v. Virginia, supra,* since overruled, the imposition on cotton brokers, with offices in Mobile, New Orleans, New York and Chicago, of a fixed fee Alabama license tax on persons engaged in the business of buying and selling futures for speculation or on commission. The 1908 theory that such national grain market operations are not interstate commerce is obsolete today, but, if still valid, would, at most, uphold the imposition of a New York tax on respondent's brokers in New York City, not an Indiana tax on respondent's gross gains from an interstate securities sales business.

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The Decision In Freeman v. Hewit is controlling

The decision in *Freeman v. Hewit* (1946), 329 U. S. 249, in effect decided the question now before the Court. There the Court might have taken the view that the sale of securities was a local transaction between two brokers operating on the New York Stock Exchange and that the ensuing shipment of the securities from Indiana to New York was an inconsequential incident to the completion of a New York sale in New York. That, in effect, was the holding of the Court as respects the Class E sales dealt with in *International Harvester Company v. Department of Treasury* (1944), 332 U. S. 340, and Indiana was permitted to tax such sales occurring within its borders, viz., sales by the seller's Indiana branch to Indiana purchasers completed by the seller's shipment of the goods from points outside Indiana to the Indiana purchasers. Correlatively, it would seem that the state of a seller's residence could impose tax on the seller with respect to such a *local* sale occurring in another state. But the Court did not so hold in *Freeman v. Hewit*. Therefore, it was not the movement of the securities across state lines in *Freeman v. Hewit* which rendered the sale a transaction in interstate commerce, but it was necessarily the negotiation and completion of the sale on a national stock exchange in the stream of interstate commerce, between a seller and a buyer located in different states, which created the interstate commerce and resulting tax immunity, exactly as the court below held in this case.

The decision of the Indiana Supreme Court in this case is founded on the premise that the holding of respondent's stock certificates in the hands of the New York City brokers, without transmission of such certificates across state

lines by respondent from Indiana to New York in completion of prior negotiated sales, did not destroy the interstate character of such sales. That holding is fully supported not only by the decisions hereinabove cited, but by the Acts of Congress in regulating, under the Commerce Clause, the very transactions upon which Indiana seeks to impose the Indiana gross receipts tax.

II

THE INDIANA GROSS RECEIPTS TAX, AS APPLIED TO GROSS GAINS FROM INTERSTATE SALES OF STOCKS, IS NOT IMPOSED ON NET INCOME BUT ON GROSS EARNINGS OR GROSS PROFITS

Gross Earnings Taxes On Interstate Commerce Are Invalid. Net Income Taxes Are Valid.

In numerous decisions this Court has made a distinction between the imposition of gross earnings or receipts taxes on interstate commerce and the imposition of net income taxes on interstate commerce. The Court has invalidated gross earnings and receipts taxes imposed on interstate commerce on the ground that such taxes impose a direct burden and constitute an interference with or regulation of commerce. *Phila. Steamship Co. v. Pennsylvania* (1887), 122 U. S. 326; *Crew Levick Co. v. Commonwealth* (1917), 245 U. S. 292; *Fisher's Blend Station, Inc. v. Tax Commission* (1936), 297 U. S. 650; *Puget Sound Stevedoring Co. v. State Tax Commission* (1937), 302 U. S. 90; *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307; *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434; *McLeod v. J. E. Dilworth Company* (1944), 322 U. S. 327; *Freeman v. Hewit* (1946), 329 U. S. 249. The Court has sustained state taxes imposed on or measured by

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net income from business carried on in interstate commerce on the ground that such net income taxes are only an indirect and remote burden on interstate commerce and therefore not a regulation of or interference with interstate commerce. *Peck & Co. v. Lowe* (1918), 247 U. S. 165; *United States Glue Co. v. Oak Creek* (1918), 247 U. S. 321; *Shaffer v. Carter* (1920), 252 U. S. 37; *Atlantic Coast Line v. Daughton* (1923), 262 U. S. 413.

Petitioner Erroneously Asserts That the Indiana Tax is a Net Income Tax

Petitioner asserts, as did the minority opinion in the Court below, that the Indiana gross receipts tax in this instance, as applied to gross profits from sales of securities from margin brokerage accounts under petitioner's Regulation 2805, is a net income tax and therefore not prohibited by the Commerce Clause.

Section 1(n) of the Indiana Gross Income Tax Act provides that the gross income of "brokers and dealers in securities" shall be deemed to mean "gross earnings."

Pursuant to the authority vested in petitioner by Section 29 of the Indiana Act (to promulgate "rules and regulations not inconsistent with this Act"), petitioner has promulgated Regulation 1005 (Petitioner's Brief, p. 5), defining the gross earnings of brokers and dealers in securities taxable under Section 1(n) of the Act as the gross difference between the cost of property and the gross receipts resulting from the sale thereof, without deduction for losses on any transactions. Under similar authority and apparently in construing and applying Section 1(n) of the Act, petitioner has promulgated Regulation 2805 (Petitioner's Brief, p. 4), treating investors operating margin

securities or commodities brokerage accounts as dealers in securities taxable under Section 1(n) of the Act on gross earnings, and defining gross earnings as the gross profits realized where securities are sold for any amount in excess of cost, without any deduction for losses incurred in other sales and without deduction for any expenses incurred in profitable sales.

While the authority for and the validity of petitioner's Regulation 2805 may be questioned (but not at this stage of this case), it is a fact that under Regulation 2805 petitioner has attempted to impose only a gross earnings or gross profits tax (not a total gross receipts tax) on respondent's interstate sales of stocks, but petitioner fallaciously asserts that the tax so imposed is a net income tax and not a gross earnings or receipts tax.

A Net Income Tax Must Allow Reasonable Deduction for Expenses and Losses Incurred In Earning Income

The Court's decisions upholding the imposition of state taxes on net income from interstate commerce in *United States Glue Co. v. Oak Creek; Shaffer v. Carter*, and *Atlantic Coast Line v. Daughton, supra,* dealt with net income taxes imposed on fairly ascertained net income after reasonable allowance of deductions for the cost and expense of earning such net income, including the cost of goods sold, all expenses of sale and losses in unprofitable sales.

The case of *Peck & Co. v. Lowe* involved the Federal Income Tax Act of October 3, 1913, which allowed full deduction for all costs of goods sold, expenses of sale and losses incurred in unprofitable sales, and the court upheld the imposition of such tax on the net income from export sales in foreign commerce. Such a net income tax was held

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to be so indirect and remote as not to fall within the prohibition of Article I, Section 9, Clause 5, of the Constitution that "no tax or duty shall be laid on articles exported from any state." The Court said:

> "* * * At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. * * *" (247 U. S. 175)

The *United States Glue* case involved a similar state net income tax and was decided on the authority of the decision in *Peck & Co. v. Lowe.*

The decision in *Shaffer v. Carter* also involved a state net income tax imposed on the business of a nonresident carried on in interstate commerce in the taxing state, and such tax was sustained on the authority of the decisions in *United States Glue Co. v. Oak Creek* and *Peck & Co. v. Lowe.*

In the *Atlantic Coast Line* case, the net income tax of North Carolina, as imposed on interstate railroads, permitted deduction from gross income for all operating expenses as defined by the Interstate Commerce Commission, but not for expenditures deemed to be capital charges. Again, the Court upheld such a tax imposed on the net income from railroad property used in interstate commerce in the taxing state.

The Court's concept of "net income," in validating state net income taxes imposed on interstate commerce, necessarily assumes that the tax provides for a reasonable allowance for costs and expenses of producing such net income. Such a concept of "net income" could not countenance a

so-called net income computation which would disallow expenses of producing income to the extent of imposing tax on assumed but nonexistent net income. This may be readily demonstrated.

First, it is fundamental accounting law and common sense that the determination of net income can be made only on the basis of a fixed period of time and that, in determining net income during whatever time period is selected, all transactions giving rise to profit, gain or loss and all reasonable costs and expenses incurred in the operation involved must be taken into account. Petitioner's Regulation 2805 fails to take into account, in computing the alleged "net income" which petitioner here seeks to tax, all of the costs and expenses incurred in making sales of stock on the New York Stock Exchange and all losses incurred in the making of such sales.

Consider, next, the concept of "income" taxable under the Sixteenth Amendment, empowering Congress "to lay and collect taxes on incomes." Significantly, the Amendment does not limit the federal tax to "net income," and the Court has therefore held that all deductions and exemptions allowed under the federal income tax are a matter of grace and may be entirely withdrawn by Congress and that the federal tax may thereby be converted into a tax on gross income. *Stanton v. Baltic Mining Co.* (1916), 240 U. S. 103; *Tyee Realty Co. v. Anderson* (1916), 240 U. S. 115; *Helvering v. Independent Life Ins. Co.* (1934), 292 U. S. 371. See discussion in Mertens, Law of Federal Income Taxation, Vol. 1, Ch. 5, Sec. 5.10.

The Court said in its decision in the *Independent Life Insurance* case:

> "Unquestionably Congress has power to condition, limit, or deny deductions from gross income

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in order to arrive at the net that it chooses to tax." (292 U. S. 381)

In the light of those decisions on the federal income tax, construing the word "income" as permissibly meaning "gross income," the Court's concept of "net income" from interstate commerce which may be taxed by the states can only refer to a reasonable ascertainment of actually realized and retainable gain or profit from interstate business or activity after the deduction of expenses and losses, which is exactly what the Court said it meant by "net income" in its opinion in the *United States Glue* case, viz.:

> "* * * The distinction between a direct and an indirect burden by way of tax or duty was developed [in the decision in Peck & Co. v. Lowe], and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.
>
> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax

upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. * * *" (247 U. S. 328)

The Indiana Tax Is Not a Tax On Net Income, But on Gross Earnings and Gross Profits

Having thus ascertained the meaning and scope of "net income" from interstate commerce which the states may tax, it is obvious that the Indiana tax, as applied by petitioner's Regulation 2805, is not a tax on net income, because it allows no deduction whatever for the expenses of selling securities and does not permit the deduction of losses in unprofitable sales. Liability for tax thus imposed could be incurred where there was no net income, but an actual loss for the taxable period, either because of the nondeductibility of expenses of sale or because of the nondeductibility of losses. Likewise, tax would be imposed on individual transactions in which a net loss was sustained. This may be illustrated by reference to but one actual sale made by respondent, viz., 100 shares of Johns-Manville Corporation sold November 22, 1944, at a gross profit of $7.30 (R., p. 9). The expense of making that sale, for brokerage commissions, transfer taxes, etc., certainly amounted to more than $7.30.

The Commercial & Financial Chronicle, Vol. 160, p. 2306, quotes Johns-Manville stock at 97¼, both high and low, on November 22, 1944. A sale of 100 shares produced $9,725.00. The then brokerage charge on such sale would have been $35.00, 35c per share on shares selling for more than $90 per share. The now prevailing commission would be $44.73 on such sale (1/10 of 1% of sales price plus

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$35.00). See Commission Rates of the New York Stock Exchange, November, 1953 Edition, published by Association of Stock Exchange Firms. On that transaction respondent suffered a net loss of $27.70.

As a Tax on Business Income, the Tax Is Imposed on Gross Income

Petitioner's only authority for the issuance of Regulation 2805 is the assumption that the operation of a margin account is a business equivalent to the business of "brokers, dealers in securities" taxable on "gross earnings" under Section 1(n) of the Indiana Act. But the petitioner's Regulation 2805 does not attempt to tax the net income of such brokerage business. Petitioner attempts to impose an income tax on the highest possible gross income, the gross profits, if the tax may be considered an income tax at all.

In *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U.S. 434, the Court invalidated the imposition of the Washington gross receipts tax on the gross earnings of a Washington fruit brokerage firm from the negotiation of interstate sales of apples and pears. The tax was imposed on gross earnings from services, or gross income, without deduction for expenses of operation. In the instant case the tax is imposed on gross profits, which is the same as gross earnings or gross income, without deduction for expenses of sales. The Court's condemnation of the Washington tax necessarily means that the tax was not a net income tax. If the Washington tax was not a net income tax, neither is the Indiana tax a net income tax.

The Instant Indiana Tax Is a Selected Transaction Tax—An Excise On the Receipt of Gross Profits

As imposed by petitioner, the tax is not in any true sense an income tax, but a selected transactions tax, an excise tax on the receipt of gross profits from selected sales of securities from margin accounts. Under no decision of this Court or of any other court, under no acceptable accounting theory or practice and under no valid rule or regulation is the tax which petitioner here seeks to levy an income tax, and certainly not a net income tax.

III

THE IMPOSITION OF THE INDIANA GROSS RECEIPTS TAX ON THE GROSS GAINS FROM SALES OF SECURITIES FROM MARGIN BROKERAGE ACCOUNTS ON THE NEW YORK STOCK EXCHANGE IS PROHIBITED BY THE COMMERCE CLAUSE

The Indiana Gross Profits Tax is Inherently Offensive to the Commerce Clause

The Indiana gross income tax is just "what it purports to be—a tax upon gross receipts from commerce," as this Court expressly held in its first decision on the Indiana tax in *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U.S. 307. The basis of the tax is utterly without limit: the same tax may be imposed by any state which, upon any ground, may assert that receipts are derived even partially from sources within the state. For that reason it is the kind of tax against which interstate commerce must be given thorough protection. That has been the treatment given to the Indiana tax in this Court.

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The Indiana Tax, Imposed Without Apportionment and as a Potential Multiple Tax Burden, Violates the Commerce Clause

In the *Adams* case the Court held that Indiana could not impose its tax on the sales receipts of an Indiana seller from outgoing interstate sales of goods to buyers in other states. Analysis of the Act and consideration of the circumstances under which it was enacted, led the Court to the following conclusions:

> "The tax is not an excise for the privilege of domicile alone, since it is levied upon the gross income of nonresidents from sources within the State. Nor is it for the transaction of business since in many instances it hits the receipt of income by one who conducts no business. It is not a charter fee or a franchise fee measured by the value of goods manufactured or the amount of sales such as the State would be competent to demand from domestic or foreign corporations for the privilege conferred.* It is not an excise upon the privilege of producing or manufacturing within the State, measured by volume of production or the amount of sales.* It is not a tax in lieu of ad valorem taxes upon property, which would be inoffensive to the commerce clause,* since the appellant pays local and state taxes upon its property within the State and it appears that these, as respects appellant and others similarly situated, have not been reduced. The Act, moreover, is silent as to the tax being in lieu of property taxes. The opinion of the Supreme Court suggests that the statute was adopted as part of a scheme for the reduction of local property taxes and the substitution of a gross income tax but, as appellant points out, provision for reduction of property taxes was made by legislation passed in 1932.*" (304 U. S. 310-11)

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* Footnotes omitted.

In holding that an unapportioned gross receipts tax could not be imposed by the seller's state on receipts from interstate sales, the Court further said:

> "We conclude that the tax is what it purports to be—a tax upon gross receipts from commerce. Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent on every dollar received from these sales.
>
> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.* We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by article 1, section 8, of the Constitution.* The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce.*" (304 U. S. 311-12)

The condemnation of a gross receipts or gross earnings tax for lack of a proper apportionment and because of the resulting potential multiple tax burdens was repeated by the Court again in *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434, invalidating the attempt of the State of Washington to impose its gross receipts

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* Footnotes omitted.

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tax on the gross earnings of a fruit broker from negotiating sales of fruit in interstate commerce.

The Lack of Apportionment Has Never Been Cured

The first defect found in the Indiana gross income tax in the *Adams* case, viz., that the tax was imposed without apportionment on gross receipts from an interstate sale, has never been cured. The Act provides for no apportionment, and petitioner has made no effort by regulation or otherwise to adopt or apply a rule of apportionment. Respondent's entire business carried on in interstate commerce is the total source of respondent's gross profits from sales. If the local delivery of the stock certificates in New York City were singled out and held to be intrastate, this might permit New York to impose tax on such local transaction, but it does not empower Indiana to impose an unapportioned gross profits tax on the entire gross profits which are derived from respondent's total interstate business and not merely from the local delivery in New York City.

The Instant Indiana Tax Imposes a Potential Multiple Burden On Commerce

The further defect found in the Indiana tax in the *Adams* case, viz., that it resulted in the imposition of potential multiple tax burdens, has not been cured and could not be cured. A potential multiple tax burden exists in this case probably more than in any similar case that has come before the Court. The operation of a margin stock brokerage account, involving an established and continuous use and investment of money, the making of purchases and sales and the management of the ac-

count, sufficiently constitutes the doing of business as to give the margin account a business situs at the place of operation, in this instance New York City. *New Orleans v. Stempel* (1899), 175 U. S. 309; *Bristol v. Washington County* (1900), 177 U. S. 133; *Metropolitan Life Insurance Co. v. New Orleans* (1907), 205 U. S. 395; *Wheeling Steel Corp. v. Fox* (1936), 298 U. S. 193; *First Bank Stock Corp. v. Minnesota* (1937), 301 U. S. 234. Even petitioner concedes that respondent is engaged in carrying on a brokerage *business*, by petitioner's Regulation 2805, taxing the gross profits from margin stock sales under Section 1(n) of the Indiana Act applicable to "brokers, dealers in securities." Under Indiana law, such business has a business situs in New York. *Miami Coal Co. v. Fox* (1931), 203 Ind. 99, 176 N. E. 11.

The state where such business situs exists has an adequate due process basis for the imposition of the same gross profits tax which petitioner seeks to impose upon respondent. Unless restrained by the prohibition of the Commerce Clause, both Indiana and New York, and even New York City, may impose a gross profits tax on respondent's gross profits from the same selected sales of stocks held in respondent's margin accounts. The Court's decision in *Norton Co. v. Department of Revenue* (1951), 340 U. S. 534, would leave little doubt as to the potential imposition of such a tax in New York state.

The Decision In Freeman v. Hewit Utterly Condemned the Application of the Indiana Tax to Interstate Sales of Securities

The lack of apportionment and the potential multiple tax burden defects not having been cured, the Court later ignored those defects in holding the Indiana tax invalid as simply a gross receipts tax on interstate commerce

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and therefore an invalid burden on and regulation of interstate commerce. This development came with the decision in *Freeman v. Hewit* (1946), 329 U. S. 249, invalidating the tax as applied to gross receipts from the sale of securities on the New York Stock Exchange by an Indiana resident, using the services of an Indiana broker and his correspondent New York brokers in initiating and negotiating such sales, and transmitting the securities sold from Indiana to New York after the sales had been negotiated.

Interstate Sales of Stock From Margin Accounts Are Exempt From the Indiana Tax Under Freeman v. Hewit

The majority opinion below relied specifically on the decision in *Freeman v. Hewit* in denying the validity of the tax imposition in the instant case. The only difference in the respective factual situations in *Freeman v. Hewit* and the case at bar is that the stock certificates were shipped from Indiana to New York by the taxpayer in *Freeman v. Hewit*, while here the stock certificates were held by the brokers in New York City. The stock certificates are the mere evidence of ownership. Their location, even their existence, is generally inconsequential in determining the validity of state tax impositions. *Greenough v. Tax Assessors* (1947), 331 U. S. 486. The Court below rejected petitioner's argument, also made here, that the absence of the interstate transmission of the stock certificates removed respondent's transactions from interstate commerce. The Court said:

> "We cannot agree. Importance cannot attach to whether a piece of paper goes over state boundaries. Importance must attach to whether the *transaction itself* was a part of interstate commerce.

> "As the Supreme Court of the United States pointed out in the case of Freeman v. Hewit, supra, the vital question in each case is whether the *sale itself* was in the field of interstate commerce. The evidence of the transaction may float around the world or stay safely buried in a gilded vault on Wall Street. It seems to us to make no decisive difference." (116 N. E. 2d 104, R., p. 28)

The decisions cited and discussed under Point I of this Argument fully support the reasoning of the Court below, particularly *Freeman v. Hewit.*

After citing numerous illustrations of permissible taxes bearing on interstate commerce, such as manufacturers' excise taxes, corporate franchise taxes, *net* income taxes and property taxes, the Court in its decision in *Freeman v. Hewit* differentiated those taxes permitted to the states from a tax like the Indiana tax which was held to be a direct and invalid tax on gross receipts from interstate commerce. The Court said:

> "These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the costs of its government, without imposing a direct tax on interstate sales. While these permitted taxes may in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause." (329 U. S. 256)

The Indiana Gross Profits or Gross Business Income Tax Falls Under the Condemnation of Gwin, White & Prince v. Henneford

It is significant, we submit, that the tax invalidated in *Gwin, White & Prince, Inc. v. Henneford, supra,* was a *gross earnings tax* and presented for all practical purposes the identical tax now before the Court. The taxpayer in that case was a brokerage firm which negotiated the sale of fruit in interstate commerce, collected the gross proceeds of sale, deducted and retained its commission charges, and remitted the net proceeds of sale to its principals. The gross earnings of the broker represented, in effect, the difference between the gross proceeds of sale and the net proceeds remitted by the broker to its principals, just as in the case at bar the respondent's gross earnings or profits are the difference between the gross proceeds of sale and the cost of stocks sold. Only gross *earnings* were taxed in *Gwin, White & Prince,* just as only gross *profits* were taxed in the instant case. Gross *receipts* from sales were taxed in neither case. Taking into account only the practical considerations involved in the two cases, we submit that, if a gross earnings tax should be sustained in this case, *Gwin, White & Prince* would have been wrongly decided. On the contrary, *Gwin, White & Prince* was correctly decided: a gross earnings or gross profits tax imposed on receipts from interstate sales is equally as burdensome and invalid as a tax imposed on the gross receipts from interstate commerce.

In the Absence of Congressional Consent, An Indiana Gross Earnings Tax Cannot Be Imposed On Interstate Commerce

The decision in the *South-Eastern Underwriters* case generated the attempt of the insurance companies in *Prudential Insurance Co. v. Benjamin* (1946), 338 U. S. 408, to invalidate the traditional state gross premium receipts taxes long imposed on insurance companies prior to the *South-Eastern Underwriters* decision. Only the enactment by Congress of the McCarran Act, 15 U. S. C. 1011-15, pursuant to its power to regulate commerce, consenting to the continued imposition of the state gross premium taxes, saved those taxes from the interdict of the Commerce Clause. There is, of course, no Congressional consent to the imposition of the Indiana tax on respondent's gross profits from interstate sales.

Respondent's Stocks Were Sold in the Stream of Interstate Commerce and Therefore Are Exempt from the Indiana Tax

Under the decisions in *Gross Income Tax Division v. Quick* (1938), 226 Ind. 329, 78 N. E. 2d 871, and *Gross Income Tax Division v. Strauss* (1938), 226 Ind. 338, cert. den. in both cases, 335 U. S. 860, respondent's margin account stocks were placed in the stream of commerce upon being offered for sale on the New York Stock Exchange, and the ensuing sales of such stocks were sales in interstate commerce exempt from the Indiana gross income tax.

Unless the Court should deny that respondent's sales of stocks on the New York Stock Exchange constituted sales in interstate commerce, or unless the Court should hold that the Indiana gross profits tax is in effect a net income

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tax, it follows ineluctably that the tax in the instant case is an invalid burden on interstate commerce.

State Taxes Discriminating Against Interstate Commerce Are Per Se Invalid

Any state tax which discriminates against interstate commerce is *per se* a prohibited burden on commerce, as all of the opinions rendered by the Justices of this Court, both majority and dissenting opinions, hold, to the extent even that, in finally reconciling his divergent views with the Court's majority views, Mr. Justice Rutledge, in his concurring opinion in *Freeman v. Hewit,* classified a potential multiple tax as a discriminatory tax, saying: "The cumulative tax burden is in effect discriminatory, involving in any practical view the exact effects of a single discriminatory tax." (329 U. S. 277.)

The Indiana Tax Discriminates Against Respondent's Interstate Business In Favor of Public Terminal Grain Handlers

But in the instant case we have real and actual discrimination against respondent and in favor of other taxpayers engaged in sales transactions not essentially different from respondent's sales of stock from margin accounts on the New York Stock Exchange. Petitioner sets out in Appendix "A" of its brief, page 28, the provisions of Section 3(h) of the Indiana Gross Income Tax Act, which imposes tax on the receipts of public terminal grain handlers from the purchase and sale of whole grain and soybeans, wherein tax at the same 1% rate is imposed on "the gross earnings, computed on an annual basis, derived from such sales

of grain and soybeans," and gross earnings are defined to mean "the gross receipts from sales of such grain and soybeans less the cost of grain and soybeans sold during such period." Under those provisions of the Indiana Act public terminal grain handlers, whether engaged in interstate or intrastate commerce, are taxed on gross earnings on an *annual* basis, not on the basis of gains from selected transactions. Such taxpayers are permitted to deduct the costs of all grain and soybeans sold from the gross proceeds of sale thereof, whereas respondent and all other sellers of securities held in marginal brokerage accounts are subjected to a gross profits tax on each individual gross gain transaction, without any deduction or benefit for losses on unprofitable transactions.

While this is a discrimination against all sellers engaged in marginal brokerage transactions, both interstate and intrastate, it is nevertheless in fact a discrimination against respondent in the imposition of tax liability on respondent's profits from interstate sales. Such equality of treatment could not purge the discrimination. In *Freeman v. Hewit,* the Court said:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause." (329 U. S. 254)

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The Indiana Tax Discriminates Against Respondent's Interstate Business Having An Out-State Business Situs In Favor of All Other Businesses Having An Out-State Business Situs

Further discrimination in the imposition of the tax on respondent's gross earnings from interstate sales of stocks arises by virtue of the statutory and regulatory provisions, set forth at pages 2-3, *supra*, exempting from tax "gross receipts derived from sources outside the State of Indiana in cases where such gross receipts are received from a trade or business situated and regularly carried on at a legal situs outside the State of Indiana." (Section 1(m) of the Indiana Act.) Petitioner's Regulation 4100, Rule 4, likewise exempts the receipts derived from the operation of a "business, the legal situs and location of which is in a state other than Indiana."

Under such business situs exemption, it could not be denied that if respondent set up his own office in New York City and there carried on the same margin stock brokerage business which is carried on for respondent by respondent's brokers in New York City, respondent's receipts from the operation of such business having a business situs outside Indiana would be exempt from tax. Petitioner's basis for taxing respondent on a so-called gross earnings basis is that respondent is engaged in business as a broker or a dealer in securities taxable under Section 1(n) of the Act on a gross earnings basis. (See discussion at pp. 19-20 and 25, *supra*.) Under Indiana law, respondent's business has a business situs in New York. *Miami Coal Co. v. Fox* (1931), 203 Ind. 99, 176 N. E. 11. Again, the fact that all margin brokerage account operators, both interstate and intrastate, are given the same tax treatment under petitioner's Regulation 2805, does not

rectify the discrimination against the interstate business conducted by respondent in the operation of his New York margin brokerage accounts. We submit, therefore, that the business situs exemption, totally exempting from tax the receipts from the operation of a business conducted outside Indiana, operates to impose a discriminatory and invalid burden on commerce if the tax against respondent should be sustained in this case.

Further, under the business situs exemption provided in the Act, Indiana sellers of tangible personal property in the operation of a business having a business situs outside Indiana, including the operation of a farm outside Indiana (as provided in petitioner's Regulation 4100, Rule 4), would be totally exempt from liability for the Indiana tax; while respondent, who is deemed to be engaged in the operation of a brokerage business or the business of dealing in securities, and who certainly has established a business situs in New York City in respect to the operation of his margin stock brokerage accounts, is subjected to tax on his gross profits from interstate sales of stocks made in the operation of such brokerage business. This further imposition of a discriminatory tax on respondent invalidates the tax.

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CONCLUSION

Only one conclusion in the determination of this case is consistent with the prior decisions of this Court cited and discussed in the foregoing Argument, viz.: That respondent's sales on the New York Stock Exchange of stock from margin brokerage accounts maintained in New York City are interstate sales; that the Indiana gross income tax, as imposed under petitioner's Regulation 2805, is not a net income tax, but is a gross profits or earnings tax; and that the imposition of such tax against respondent is a direct and discriminatory burden on interstate commerce and for that reason is invalid.

It may appropriately be added that to sustain the tax in this case would potentially open the door to the imposition of state gross receipts, earnings and profits taxes on the vast volume of margin account transactions on all of the securities and commodities exchanges operating in the United States, including the great volume of hedging and margin dealings in grain and commodity futures legitimately carried on for the protection of the great industries of the country manufacturing food and other products and for the benefit as well of the general public. To sustain the instant tax would put a tremendous volume of the interstate commerce of the country in jeopardy of the imposition of state gross receipts, earnings and profits taxes to which such commerce has not heretofore been subjected. The widespread imposition of state net income taxes on such commerce is enough.

The petitioner now asks the Court to sustain an isolated transactions tax on gross earnings from interstate commerce, when the Court has heretofore validated only legiti-

mate net income taxes thereon. Sound legal and economic reasons negative the imposition of such additional gross income taxes. If the State of Indiana desires to tax interstate commerce it should adopt a true net income tax.

Respectfully submitted,

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